PERWIRA AFFIN BANK BHD

v.

MDV TECHNICAL SERVICES SDN BHD

HIGH COURT MALAYA, JOHOR BAHRU
VERNON ONG LAM KIAT JC
[ORIGINATING SUMMONS NO: [MT-1] 24-110-1998]
12 MAY 2008

CIVIL PROCEDURE: *Judgments and orders - Setting aside, application for - Order for sale - Inherent jurisdiction of High Court - Whether court could set aside a final order regularly obtained from another court of concurrent jurisdiction*

CIVIL PROCEDURE: *Jurisdiction - Inherent jurisdiction of court - High Court - Whether court could set aside a final order regularly obtained from another court of concurrent jurisdiction*

LAND LAW: *Charge - Order for sale - Setting aside - Inherent jurisdiction of High Court - Whether interest claimed in breach of statutory provisions - Whether legislation applied retrospectively - Bankruptcy Act 1967, s. 8(2A)*

CIVIL PROCEDURE: *Interest - Order for sale - Setting aside - Whether interest claimed in breach of statutory provisions - Whether legislation applied retrospectively - Bankruptcy Act 1967, s. 8(2A)*

The defendant created a third party charge (registered on 17 January 1989) over certain land ('charged land') in favour of the plaintiff as security for banking facilities granted by the plaintiff to another party ('borrower'). On 23 March 1994, a winding-up order was granted against the defendant. Meanwhile, the borrower defaulted in repayment of the banking facilities, and the plaintiff issued the statutory Form 16D Notice of Default by Chargor to the defendant. The plaintiff subsequently applied for an order for sale of the charged land, which application was granted at the conclusion of an *inter partes* hearing on 10 December 1998. The defendant did not appeal against the order for sale; however, on 30 July 2007, it filed this application to set aside the order for sale. The issues to be determined were: (i) whether one High Court could set aside a final order (in this instance, the order for sale) regularly obtained from another High Court of concurrent jurisdiction; and (ii) whether s. 8(2A) of the Bankruptcy Act 1967 ('Act') had retrospective effect. The defendant argued that the

plaintiff failed to realise the security under the charge within six months from the date of the winding-up order. Applying the provisions of s. 8(2A) of the Act read together with s. 4(1) of the Civil Law Act 1956, the plaintiff was precluded from claiming any interest after the date of the winding-up order. In this case, the order for sale included interest for the period calculated from 11 December 1998, a date which extended beyond the cut-off date. Therefore, any interest included after 23 March 1994 was in clear breach of s. 8(2A) of the Act. The defendant submitted that as the order for sale was obtained in breach of statute, there was clear existence of a cause to the contrary and the order for sale ought not to have been granted in the first place.

Held (dismissing the application):

(1) In the light of the Federal Court's decision in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd*, it is clear that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. The one special exception to this rule is where the final judgment of the High Court can be proved to be null and void on the ground of illegality or lack of jurisdiction. In such instances, the High Court, being a court of unlimited jurisdiction, even in the absence of an express enabling provision, has inherent power to set aside its own orders made in breach of written law. Therefore, this court had the inherent power to set the order for sale aside if it was obtained in breach of any statutory provision. (para 18)

(2) In this instance, the charge was registered on 17 January 1989, a date which preceded both the date of the winding-up order (23 March 1994) and the date s. 8(2A) of the Act came into force (17 July 1992). Applying the principles enunciated by the Court of Appeal in *RHB Bank Bhd v. Ya'acob Mohd Khalid*, when the land was charged on 17 January 1989 the plaintiff had acquired a right as a secured creditor to realise its security. As such, the law applicable to the plaintiff was the law as it was on 17 January 1989. Since s. 8(2A) of the Act subsequently came into force on 17 July 1992, the plaintiff's acquired rights as a secured creditor were not affected. Thus, it could not be said that the interest claimed by the plaintiff was in breach of s. 8(2A) of the Act.

Accordingly, the defendant's contention that the plaintiff's claim for interest was in breach of statutory provisions was without merit. (paras 25 & 26)

Case(s) referred to:

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(foll)***

Chong Keat Realty Sdn Bhd v. Ban Hin Lee Bank Bhd [2003] 3 CLJ 532 CA ***(refd)***

Hock Hua Bank Bhd v. Sahari Murid [1980] 1 LNS 92 FC ***(refd)***

Isaacs v. Robertson [1985] AC 97 ***(refd)***

Lian Keow Sdn Bhd (in liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 1 LNS 44 SC ***(refd)***

Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(refd)***

M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor [1994] 2 CLJ 14 SC ***(refd)***

MUI Bank Bhd v. Cheam Kim Yu [1992] 4 CLJ 2229; [1992] 1 CLJ (Rep) 222 SC SC ***(refd)***

OCBC Bank (Malaysia) Bhd v. Tan Eng Kwee [2003] 3 CLJ 161 HC ***(dist)***

Perwira Affin Bank Bhd v. Tan Ah Tong [2003] 2 CLJ 320 HC ***(refd)***

RHB Bank Bhd v. Ya'acob Mohd Khalib [2008] 1 CLJ 80 CA ***(foll)***

Scotch Leasing Sdn Bhd v. Chee Pok Choy & Ors [1997] 2 CLJ 58 SC ***(refd)***

UMBC Bhd v. Syarikat Perumahan Luas Sdn Bhd (No 2) [1983] 3 MLJ 352 ***(refd)***

United Malayan Banking Corporation Bhd v. Syarikat Perumahan Luas Sdn Bhd (No 2) [1988] 3 MLJ 352 ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, s. 8(2), (2A)
Civil Law Act 1956, s. 4(1)
Contracts Act 1950, s. 66
Malay Reservations Enactment, s. 13

For the plaintiff - GC Tan; M/s Shook Lin & Bok
For the defendant - Tejindarpal Kaur; M/s Tejindarpal & Co

Reported by Suresh Nathan

JUDGMENT

Vernon Ong Lam Kiat JC:

[1] By a summons in chambers filed on 30 July 2007 (encl.. 4) the defendant seeks to set aside an order for sale dated 10 December 1998. In respect of this application the following affidavits were filed:

1. Defendant's affidavit affirmed on 21 June 2007 (encl. 5);
2. Plaintiff's affidavit in reply affirmed on 14 August 2007 (encl. 6);
3. Defendant's affidavit in reply affirmed on 28 August 2007 (encl. 7);
4. Plaintiff's affidavit in reply (2) affirmed on 11 September 2007 (encl. 8);
5. Defendant's further affidavit affirmed on 12 September 2007 (encl. 9);
6. Defendant's affidavit in reply (2) affirmed on 20 September 2007 (encl. 10);
7. Plaintiff's affidavit in reply (3) affirmed on 26 September 2007 (encl. 11);
8. Plaintiff's affidavit in reply (4) affirmed on 5 October 2007 (encl. 12);
9. Defendant's further affidavit affirmed on 7 November 2007 (encl. 13);
10. Defendant's further affidavit (3) affirmed on 18 December 2007 (encl. 14); and
11. Plaintiff's affidavit in reply (5) affirmed on 7 January 2008 (encl. 15).

Background Facts

[2] On 16 January 1989 the defendant created a third party charge over the land held under document of title HS (d) 46317 PTD No. 22712 Mukim Plentong ('the charged land') to the plaintiff as security for banking facilities granted by the plaintiff to Gan United Cannery Sdn. Bhd. ('the borrower'). The third party charge was registered on 17 January 1989. On 23 March 1994 a winding-up order was granted against the defendant. Meanwhile, the borrower defaulted in repayment of the banking facilities. On 31 November 1995 the plaintiff issued the statutory Form 16D Notice of Default by Chargor to the defendant. Subsequently by an originating summons dated 4 February 1998 the plaintiff applied for an order for sale of the charged land. The order for sale was made at the conclusion of an *inter partes* hearing on 10 December

1998. The defendant did not appeal against the said order for sale. On 2 January 2002 a private caveat was lodged over the charged land by one Mahanbir Singh Manmohan Singh, a contributory of the defendant company. Subsequently on 10 September 2004 the defendant filed an application to restrain the auction of the charged land which was fixed on 14 September 2004. On 13 September 2004 the High Court dismissed the defendant's application for the injunction. No appeal was lodged against the said order of dismissal. On 19 July 2007 the plaintiff's application for the removal of the private caveat was allowed with costs. On 30 July 2007 the defendant filed this application for the setting aside of the order for sale.

Preliminary Objection

[3] Learned counsel for the plaintiff argued that the defendant's application ought to be dismissed outright for being an abuse of process of court. Firstly, he submitted that the court is *functus officio* and has no power to hear the application. The order for sale had already been perfected and the defendant did not appeal against the same. Accordingly, it was argued that the defendant was attempting to re-litigate the plaintiff's application for the order for sale. In support thereof, learned counsel cited *Hock Hua Bank Bhd v. Sahari bin Murid* [1980] 1 LNS 92, *MUI Bank Bhd v. Cheam Kim Yu* [1992] 4 CLJ 2229; [1992] 1 CLJ (Rep) 222, *Scotch Leasing Sdn. Bhd. v. Chee Pok Choy & Ors* [1997] 2 CLJ 58 and *Perwira Affin Bank Bhd. v. Tan Ah Tong* [2003] 2 CLJ 320.

[4] Secondly, learned counsel submitted that the court has no power to set aside the said order for sale as it was made at the conclusion of an *inter partes* hearing. (see *Chong Keat Realty Sdn. Bhd. v. Ban Hin Lee Bank Bhd* [2003] 3 CLJ 532 and *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36.

[5] Thirdly, it was also submitted that the defendant is guilty of inordinate delay in filing the application. It has been more than ten years since the said order for sale was made and more than three years since the said order was served on the provisional liquidator of the defendant. No explanation was given by the defendant for the delay in filing the application. (see *Chong Keat Realty v. Ban Hin Lee Bank Bhd (supra)*)

[6] Learned counsel for the defendant argued that the order for sale is illegal as it was procured in breach of statutory provisions. Accordingly, the doctrine of *res judicata* and the argument of *functus officio* together with the fact that the defendant did not appeal against the said order is not applicable. (*UMBC Bhd v. Syarikat Perumahan Luas Sdn. Bhd. (No. 2)* [1983] 3 MLJ 352) Learned counsel argued that the plaintiff was claiming interests which the plaintiff was not entitled to in law. This constituted a cause to the contrary. After considering the aforesaid submissions, I overruled the plaintiff's preliminary objection and proceeded to hear the application on its merits.

Defendant's Submission

[7] The defendant's main bone of contention is premised on the determination of two principal issues, *viz.*, (i) whether one High Court can set aside a final order regularly obtained from another High Court of concurrent jurisdiction; and (ii) whether s. 8(2A) of the Bankruptcy Act 1967 had retrospective effect.

Whether One High Court Can Set Aside A Final Order Regularly Obtained From Another High Court Of Concurrent Jurisdiction

[8] The order for sale dated 10 December 1998 was made on an *inter partes* hearing. No appeal was lodged against the said order by the defendant. The defendant's application to set the order for sale was only made on 30 July 2007. The issue to be determined was whether this court can set aside an *inter partes* order of a court of concurrent jurisdiction, and if so under what circumstances.

[9] Learned counsel for the defendant contended that notwithstanding that the order for sale is a final order, it could be set aside. Firstly, he referred to the following passages in the judgment of the Supreme Court in the case *M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1994] 2 CLJ 14 at p. 22 respectively.

> Be it so, one common principle of law emerges from these judgments and that is the chargor's proprietary rights is not entirely extinguished and so he is entitled to make an application to set aside an improper sale. We are not prepared to construe that a chargor is divested of his proprietary rights at the fall of

the hammer nor are we disposed to interpret the complete surrender of his rights to the chargee at the making of the order of sale so as to deprive him of the fights to challenge the propriety of the sale.

The order for sale confers on the chargee only the statutory rights to a judicial sale. A sale under s 256 or s 260 of the NLC is a judicial sale ordered by the court on the application of the chargee. The chargor, who has until that stage not been divested of his proprietary rights, may intervene to set aside the sale in the event of fraud, impropriety or the breach of any statutory or contractual terms of the sale. We agree that the terms or conditions of sale may be varied, if having regard to the interest of both the chargor and chargee, it is fair to do so; but the sale being a judicial one, has to be done by the court after giving the chargor the right to be heard. As the court's power to order the sale, including the authority to fix the price and conditions of sale, is derived from the statutory provisions of the NLC after giving the chargor the right to be heard, it is manifest that any alteration to the terms or conditions must likewise be exercised.

[10] In reply learned counsel for the plaintiff submitted that *M & J Frozen Food Sdn Bhd (supra)* is inapplicable because the facts in that case are clearly distinguishable. In that case the issue concerned the powers of the court to set aside a sale of land in a public auction pursuant to an order for sale. I agree with the plaintiff's submission that this authority is not applicable as the issue therein related to the setting aside of a sale which was completed pursuant to a public auction. This is plainly distinguishable from the issue at hand, namely the setting aside of an order for sale.

[11] Learned counsel for the defendant also cited *United Malayan Banking Corporation Bhd v. Syarikat Perumahan Luas Sdn Bhd (No. 2)* [1988] 3 MLJ 352 concerning an application by the chargor to set aside the order for sale on its merits. In that case the order for sale was made in the absence of the chargee. It was argued by the chargee that since the chargor had not availed himself of the remedy of appeal, it was not open to him to impugn the order for sale. In rejecting the said argument Edgar Joseph Jr. J (as he then was) said:

But in *Harkness v. Bell's Asbestos & Engineering Ltd.* Lord Diplock stated the general rule at p. 736 thus:

> It has long been laid down that where an order is a nullity, the person whom the order purports to affect has the option of either ignoring it or going to court and asking for it to be set aside.

This general rule was referred to with approval by Abdoolcader J (as he then was) when speaking for the Federal Court in *Eu Finance Bhd v. Lim Yoke Foo* and he added that:

> When an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be attacked in collateral proceedings, before any court or tribunal and whenever it is relied upon – in other words it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent.

And in the next paragraph, he dealt with the effect of failure to take advantage of the remedy of appeal where the impugned order is a nullity in these words:

> Where a decision is null by reason of want of jurisdiction, it cannot be cured in any appellate proceedings; failure to take advantage of this somewhat futile remedy does not affect the nullity inherent in the challenged decision. The party affected by the decision may appeal 'but he is not bound to (do so), because he is at liberty to treat the act as void': see *Birmingham Churchwardens & Overseers v. Shaw* [1849] 10 QB 868 at p 880 per Denham CJ.

[12] Finally, learned counsel for the defendant submitted that the defendant's application fell within the exception as enunciated by the Federal Court in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75. In that case the appellants charged their land to the respondent as security for granting a loan to a third party. Owing to a breach of the loan agreement the respondent obtained an order for sale of the property. The appellants successfully applied to have the charge and the order for sale declared null and void on the ground that they were in violation of the prohibition imposed by s. 13 of the Malay Reservations Enactment. The respondent then filed an application before the same judge for a declaration that the appellants, having received a benefit from the respondent pursuant to s. 66 of the Contracts Act 1950 were liable to repay the outstanding amount owing to the respondent. An order for sale was granted on 8 October 1990 ('the second order'), notwithstanding

the invalidity of the charge and the first order for sale as decreed by the same judge previously. The appellants subsequently applied and obtained an order setting aside the second order on the basis that they were entitled to the remedy *ex debito justitiae*. The respondent appealed to the Court of Appeal which allowed the appeal on the ground that the High Court was *functus officio* and thus had no jurisdiction to set aside the second order irrespective of any illegality in it. The appellants appealed to the Federal Court. In allowing the appeal the Federal Court had this to say.

[13] At p. 92, Mohd Azmi FCJ said:

> It is of course settled law as laid down by the Federal Court in *Hock Hua Bank* case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule (was not in issue and therefore not discussed in *Hock Hua Bank*) is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of *Isaacs v. Robertson* [1985] AC 97 where Lord Diplock while rejecting the legal aspect of voidness and voidability in the orders made by a court of unlimited jurisdiction, upheld the existence of a category of orders of the court "...which a person affected by the order is entitled to apply to have set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and give to the judge a discretion as to the order he will make.

[14] Continuing at p. 93 Mohd Azmi FCJ added:

> For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the Superior Courts to set aside an order of court *ex debito justitiae* to a category of cases involving orders which contravened "any written law", the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such

a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.

[15] And at p. 112 Gopal Sri Ram JCA said:

It is true, as a general rule, that orders of a court of unlimited jurisdiction may not be impugned on the ground that they are void in the sense that they may not be ignored or obeyed. The decision of the Judicial Committee of the Privy Council in *Isaacs v. Robertson* [1985] AC 97 affirms the existence of the rule. There Lord Diplock when delivering the advice of the Board said:

> Their Lordships would, however, take this opportunity to point out that in relation to orders of a court of unlimited jurisdiction it is misleading to seek to draw distinctions between orders that are 'void' in the sense that they can be ignored with impunity by those persons to whom they are addressed, and orders that are 'voidable' and may be enforced unless and until they are set aside. Dicta that refer to the possibility of there being such a distinction between orders to which the descriptions 'void' and 'voidable' respectively have been applied can be found in the opinions given by the Judicial Committee of the Privy Council in the appeals *Marsh v. March* [1945] AC 271 at p. 284 and *Macfoy v. United Africa Co Ltd.* [1962] AC 152 at p. 160; but in neither of those appeals nor in any other case to which counsel has been able to refer their Lordships has any order of a court of unlimited jurisdiction been held to fall into a category of court orders that can simply be ignored because they are void *ipso facto* without there being any need for proceedings to have them set aside. The cases that are referred to in these dicta do not support the proposition that there is any category of orders of a court of unlimited jurisdiction of this kind; what they do support is the quite different proposition that there is a category or orders of such a court which a person affected by the order is entitled to apply to have set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and give to the judge a discretion as to the order he will make. The judges in the cases that have drawn the distinction between the two types of orders have cautiously refrained from seeking to lay down a

comprehensive definition of defects that bring an order into the category that attracts *ex debito justitiae* the right to have it set aside, save that specifically it includes orders that have been obtained in breach of rules of natural justice.

[16] Continuing at p. 113, Gopal Sri Ram JCA said:

It is one thing to say that an order of a court of unlimited jurisdiction must be obeyed until it is set aside. It is quite a different thing to say that a court of unlimited jurisdiction may make orders in breach of written law. *Isaacs v. Robertson* is certainly not authority for the latter proposition. I take it to be well settled that even courts of unlimited jurisdiction have no authority to act in contravention of written law. Of course, so long as an order of a court of unlimited jurisdiction stands, irregular though it may be, it must be respected. But where an order of such a court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside in the proceedings brought for that purpose. It is then entirely open to the court, upon the illegality being clearly shown, to grant a declaration to the effect that the order is invalid and to have it set aside. It is wrong to assume that such an order may only be corrected on appeal.

[17] And at p. 117 Gopal Sri Ram JCA said:

It is therefore clear, in light of the principles established by high authority, that a court of unlimited jurisdiction, even in the absence of an express enabling provision, has inherent power to set aside its orders made in breach of written law. The ends of justice will not be met if such a power did not exist. And the procedural branch of the broad and flexible doctrine of estoppel known as *res judicata* finds no place in such a circumstance. Neither has the *functus officio* theory, which, upon close examination is merely part and parcel of the doctrine of *res judicata*, any role to play in the case.

[18] In the light of the decision of the Federal Court in *Badiaddin Mohd Mahidin (supra)* it is clear that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. The one special exception to this rule is where the final judgment of the High Court can be proved to be null and void on the ground of illegality or lack of jurisdiction. In such instance, the High Court, being a court of unlimited jurisdiction, even in the absence of an express enabling provision, has inherent power to set aside its own orders made in breach of written law. I therefore agree with the defendant's

submission that this court has the inherent power to set the order for sale aside if it was obtained in breach of any statutory provision. Accordingly, I proceeded to consider the second issue.

Whether s. 8(2A) Of The Bankruptcy Act 1967 Had Retrospective Effect

[19] Learned counsel for the defendant argued that the Order for Sale is void *ab initio* because the outstanding sum stated therein is not as at the date the defendant company was wound up. The plaintiff has apparently claimed interest from 11 December 1998 to the date of full settlement. The defendant company was wound-up on 23 March 1994. It was contended that the plaintiff is only entitled in law to claim interest until 23 March 1994. The defendant's contention is premised on sub-s. (2A) of s. 8 of the Bankruptcy Act 1967. For completeness, both sub-ss. (2) and (2A) of s. 8 are reproduced:

> **8. Effect of receiving order**
>
> (2) This section shall not affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if this section had not been passed – nor shall it operate to prejudice the right of any person to receive any payment under or by virtue of the provisions of section 31 of the Employment Act, 1955 of the States of West Malaysia or any corresponding provisions in Sabah and Sarawak.
>
> (2A) Notwithstanding subsection (2), no secured creditor shall be entitled to any interest in respect of his debt after the making of a receiving order if he does not realise his security within six months from the date of the receiving order.

[20] Section 8(2A) provides that "no secured creditor shall be entitled to any interest in respect of his debt after the making of a receiving order if he does not realise his security within six months from the date of the receiving order." It was submitted that by virtue of s. 4(1) Civil Law Act 1956 and the principles laid down in *Lian Keow Sdn Bhd (in liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 1 LNS 44 the definition of 'secured creditor' in s. 8(2A) Bankruptcy Act 1967 applied to the winding-up of companies. Section 4(1) of the Civil Law Act 1956 is as follows:

4. Administration of insolvent estates, and winding-up of companies

(1) In the administration by any Court of the assets of any deceased person whose estate proves to be insufficient for the payment in full of his debts and liabilities, and in the winding-up of any company under any law from time to time in force relating to companies, whose assets prove to be insufficient for the payment of its debts and liabilities, and the costs of winding-up, the same rules shall prevail and be observed, as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as are in force for the time being, under the law of bankruptcy, with respect to the estates of persons adjudged bankrupt.

[21] Learned counsel argued that the plaintiff failed to realise the security under the charge within six months after the date of the winding-up order. Applying the provisions of s. 8(2A) read together with s. 4(1) Civil Law Act 1956 the plaintiff is precluded from claiming any interest after the date of the winding-up order. In this instance the order for sale included interest for the period calculated from 11 December 1998 onwards, a date which extends after the cut-off date. Therefore, any interest included after 23 March 1994 is in clear breach of s. 8(2A) Bankruptcy Act. Learned counsel for the defendant submitted that as the order for sale was obtained in breach of statute, there is a clear existence of a cause to the contrary and the order for sale ought not to have been granted in the first place.

[22] In support thereof learned counsel for the defendant relied on *OCBC Bank (Malaysia) Bhd v. Tan Eng Kwee* [2003] 3 CLJ 161. In this case the plaintiff by way of a charge action, applied for an order for sale to recover a debt inclusive of interest as at 23 January 2003. Previously, a receiving order had been made against the defendant on 4 October 2001. Relying on s. 8(2A) of the Bankruptcy Act the defendant contended that the plaintiff as a secured creditor would not be entitled to any interest in respect of the debt after the receiving order was made as the plaintiff had not realised his security within six months thereof, ie., on or before 4 April 2002. The issue before the High Court was whether, upon a proper construction of s. 8(2A) of the Bankruptcy Act, the plaintiff was entitled to all interest as at 23 January 2003 or until the making of the receiving order on 4 October 2001. It was held that the plaintiff as a secured creditor under s. 8(2A) shall not be

entitled to any interest in respect of the debt after the receiving order was made on 4 October 2001 if the plaintiff did not, on or before 4 April 2002, convert into money the security, ie., the land charged to the plaintiff. The act of converting into money is the act of receiving payment of the proceeds of sale from the successful bidder pursuant to the sale order. As this was not the case, the plaintiff was held not entitled to any interest regarding the debt in question.

[23] In reply learned counsel for the plaintiff submitted that the defendant's contention is misconceived. Section 8(2A) was not intended to have retrospective effect. In support thereof learned counsel relied on the recent decision of the Court of Appeal in *RHB Bank Bhd v. Ya'acob Mohd Khalib* [2008] 1 CLJ 80. In that case the plaintiff appealed against the decision of the High Court disallowing the plaintiff's claim for interest on the principal sum in a charge action against the defendant. The High Court was of the view that the plaintiff failed to realise its security within six months from the date of the receiving order made against the defendant as required under s. 8(2A). The defendant was adjudged a bankrupt on 24 November 1986 before the coming into force of s. 8(2A) on 17 July 1992. Notwithstanding the aforesaid the High Court held that s. 8(2A) applied to the plaintiff. In allowing the appeal the Court of Appeal said at p. 162:

> In the instant case by virtue of subsection 2 of s. 8 of the Bankruptcy Act the plaintiff had acquired a right as a secured creditor to realise its security when the land was charged to the plaintiff on 29 December 1986. As such the law applicable to the plaintiff was the law as it was on 29 December 1986. Subsection (2A) which was introduced by the Bankruptcy (Amendment) Act 1992 (Act A 827) and which came into force on 17 July 1992 could not, therefore, take away the plaintiff's accrued right under s. 8(2) as the amending Act did not clearly and specifically provide that that subsection (2A) would have a retrospective effect. It was therefore not intended to have a retrospective effect. To read otherwise it would produce an unjust result as that subsection (2A) deals with a substantive right.

[24] In considering the aforesaid submissions of the defendant and the plaintiff it is useful to bear in mind the following pertinent dates, namely:

17 January 1989	...	charge registered
17 July 1992	...	s. 8(2A) came into force
23 March 1994	...	winding-up order made against defendant company
10 December 1998	...	order for sale made after *inter partes* hearing

[25] In this case the charge was registered on 17 January 1989. The date of the creation of the charge preceded (i) the date of the winding-up order (23 March 1994) and (ii) the date sub-s. (2A) came into force (17 July 1992). In *OCBC Bank (Malaysia) Bhd v. Tan Eng Kwee (supra)* the issue before the High Court was whether, upon a proper construction of s. 8(2A) of the Bankruptcy Act, the plaintiff was only entitled to all interest calculated up to the date of the receiving order on 4 October 2001. There was unfortunately nothing in the judgment to indicate whether the charge in question was registered before or after sub-s. (2A) came into force. There is also no mention in the judgment on the issue of whether or not sub-s. (2A) had retrospective effect. Accordingly, *OCBC Bank (Malaysia) Bhd v. Tan Eng Kwee (supra)* is of no aid to the defendant's contention.

[26] Applying the principles enunciated by the Court of Appeal in *RHB Bank Bhd (supra)*, when the land was charged on 17 January 1989 the plaintiff had acquired a right as a secured creditor to realise its security. As such the law applicable to the plaintiff was the law as it was on 17 January 1989. Since sub-s. (2A) subsequently came into force on 17 July 1992 the plaintiff's acquired rights as a secured creditor was not affected. In the premises, it cannot be said that the interest claimed by the plaintiff is in breach of sub-s. (2A). Accordingly the defendant's contention that the plaintiff's claim for interest is in breach of statutory provisions is without merit.

[27] For the reasons adumbrated, the defendant's application is dismissed with costs.